Hor Chee Meng v Yeng Chong Realty Sdn Bhd (No 2)

HIGH COURT (KUALA LUMPUR) — SUIT NO D28–984–11 OF 2011
HASNAH MOHAMMED HASHIM J
2 MAY 2012

Civil Procedure — Striking out — Petition — Winding up petition withdrawn — Settlement of debt due — Absolve of payment of debt under judgment — Whether petition should be struck off — Rules of the High Court 1980 O 18 r 19(1)(b) & (d)

The petitioner had purchased a bungalow lot from the respondent and the project was developed jointly between the respondent and MBSB Sdn Bhd. The parties entered into a sale and purchase agreement ('SPA') and the petitioner paid the full purchase price of RM69,732. In his claim for late delivery of vacant possession, the petitioner proceeded to file a suit in the magistrate court for liquidated damages. The petitioner was successful in his application and obtained the judgment against the respondent. The petitioner went on to file a winding up petition ('the first winding up petition') and the respondent offered to settle the sum of RM21,917.65 claimed under the petitioner's s 218 notice (of the Companies Act 1965). The express term of the offer was made on the basis that payment would absolve the respondent of the debt under the judgment. The parties reached a settlement to settle the amount of RM24,708.48 and the first winding up petition was then withdrawn. The issue that arose for the court's adjudication was whether the petition should be struck off under O 18 r 19(1)(b) and/or (d) of the Rules of the High Court 1980.

Held, dismissing the application with costs:
This case was clearly not a plain and obvious case that should be summarily disposed. There was a valid cause of action which would have to be dealt with by the hearing petition. In a striking out application, the court would dismiss an action summarily only if it was a plain and obvious case. One of the main grounds relied upon by the respondent for this application was that there was no judgment obtained by the petitioners and that the debt had been compromised. Even though the petition was not based on a judgment, the matter must be decided at the hearing of the petition whether there was a debt and the respondent was at liberty to dispute it (see paras 29, 32 & 34).

[Bahasa Malaysia summary

Pempetisyen telah membeli lot banglo daripada responden dan projek tersebut dibangunkan secara bersama di antara responden dan MBSB Sdn Bhd.

Pihak-pihak memasuki perjanjian jual dan beli ('SPA') dan pempetisyen membayar harga belian penuh sejumlah RM69,732. Dalam dakwaannya untuk penghantaran lewat milikan kosong, pempetisyen meneruskan untuk memfailkan tindakan di mahkamah majistret untuk ganti rugi yang ditetapkan. Pempetisyen berjaya dalam permohonannya dan memperolehi penghakiman terhadap responden. Pempetisyen terus memfailkan petisyen penggulungan ('petisyen penggulungan pertama') dan responden menawarkan untuk menyelesaikan jumlah RM21,917.65 yang dituntut di bawah notis s 218 (Akta Syarikat 1965) pempetisyen. Terma nyata tawaran tersebut dibuat atas dasar bahawa bayaran akan membebaskan responden daripada hutang di bawah penghakiman. Pihak-pihak mencapai penyelesaian untuk menyelesaikan jumlah RM24,708.48 dan petisyen penggulungan pertama ditarik balik. Isu yang yang berbangkit untuk penghakiman mahkamah adalah sama ada petisyen patut dibatalkan di bawah A 18 k 19(1)(b) dan/atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980.

Diputuskan, menolak permohonan dengan kos:
Kes ini jelas bukan kes yang jelas dan nyata yang patut didengar secara terus. Terdapat kausa tindakan yang sah yang perlu diuruskan melalui petisyen pendengaran tersebut. Dalam permohonan pembatalan, mahkamah akan menolak tindakan secara terus hanya jika ia adalah kes yang jelas dan nyata. Salah satu alasan utama yang digunakan oleh responden untuk permohonan ini adalah bahawa tidak terdapat penghakiman yang diperolehi oleh pempetisyen-pempetisyen dan bahawa hutang telah dikompromi. Walaupun petisyen tidak berdasarkan penghakiman, perkara mesti diputuskan pada masa pendengaran petisyen sama ada terdapat hutang dan responden bebas untuk mempertikaikannya (lihat perenggan 29, 32 & 34).]

Notes

For cases on petition, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 8055–8057.

Cases referred to

AG of Duchy of Lancaster v L&NW Railway Co [1892] 3 Ch 274,CA (refd)
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)
Filotek Trading Sdn Bhd v Buildcon-Cimaco Concrete Sdn Bhd [1999] 4 MLJ 268; [1999] 4 CLJ 135, HC (refd)
Golden Century Development Sdn Bhd & Anor v Ganhoe & Anor [1983] 1 MLJ 86, FC (refd)
Kee Chai Heng v Ketua Polis Daerah Kuala Muda & Anor [1999] 2 MLJ 668; [1999] 2 CLJ 664, HC (refd)
Lee Nyan Choi v Voon Noon [1979] 2 MLJ 28, FC (refd)
Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other Appeals [2001] 4 MLJ 187, CA (folld)

A *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95, SC (refd)
Perbadanan Labuan v Sabah Urban Development Corporation Sdn Bhd [2009] 6 CLJ 700, HC (refd)
Roslan bin Abdullah v New Zealand Insurance Co Ltd [1981] 2 MLJ 324, FC
B (refd)
SP Setia Bhd v Gasing Height Sdn Bhd [2001] 5 MLJ 117; [2001] 6 CLJ 51, HC (refd)
Tan Kim Hor & Ors v Tan Heng Chew & Ors [2003] 1 MLJ 492; [2003] 1 CLJ 634, CA (refd)

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Legislation referred to

Companies Act 1965 ss 205, 217(1), 218, 218(1)(d), (1)(m), (1)(n)
Rules of the High Court 1980 O 14A, O 18 r 19, 19(1)(b), (d)
Subordinate Courts Act 1948 s 90

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Prakash Mehta (K Nadarajah & Partners) for the petitioner/respondent.
George Dicom (Sunita Sankey with him) (AG Dicom & Co) for the respondent/appellant.

E **Hasnah Mohammed Hashim J:**

[1] Enclosure 6 is the respondent's application for the following orders:

(a) that the petition dated 18 November 2011 be struck off under O 18 r 19(1)(b) and/or 19(1)(d) of the Rules of the High Court 1980;

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(b) cost of the application; and

(c) such further and/or other relief.

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[2] The application is supported by an affidavit affirmed on 4 January 2011.

GROUNDS FOR APPLICATION

H **[3]** There is no debt due as there is a compromise between the parties as to amount due and full payment as been made. The judgment on which this winding up petition has been premised was settled in October 2006. There was a forbearance and compromise of the said judgment.

I **[4]** The petitioner's act of attempting to demand the entire amount is wrong in law.

[5] The respondent is not liable to pay the amount demanded by the petitioner.

[6] The respondent is solvent.

BRIEF FACTS

[7] The petitioner purchased a bungalow lot from the respondent. The project was developed jointly between the respondent and MBSB Sdn Bhd. The parties entered into a sale and purchase agreement dated 10 June 1999 ('SPA') and the petitioner paid the full purchase price of RM69,732. The petitioner then claimed for late delivery of vacant possession and filed a suit in the magistrates' court for liquidated damages on 22 September 2003.

[8] The petitioner obtained judgment against the respondent on 28 April 2006. On 23 June 2006 the petitioner filed a winding up petition (the first winding up petition). The respondent made an offer to settle the sum of RM21,917.65 claimed under the petitioner's s 218 notice. The express term of the offer was made on the basis that payment would absolve the respondent of the debt under the judgment. Subsequently on 2 October 2006 the parties reached a settlement to settle the amount of RM24,708.48. The first winding up petition was then withdrawn.

THE APPLICANT/RESPONDENT'S ARGUMENTS

[9] Following the compromise of the judgment, the petitioner had filed an originating summons in 2011 for, inter alia, a declaration that further sums be paid under the compromised judgment. It is submitted by learned counsel for the respondent that that the petitioner was aware at that stage that no recourse could be had to the judgment as it had been compromised. Furthermore the issue of whether a compromise has been reached is now before another court (22NCC-2169–12 of 2011). The court had directed on 2 February 2012 that the issue be disposed of by way of an O 14A application.

[10] It is further submitted that the judgment was issued by the magistrates' court and is therefore subject to s 90 of the Subordinate Courts Act 1948.

[11] The magistrate was clothed with the monetary jurisdiction to award a sum not exceeding RM25,000.

[12] Learned counsel for the respondent further submitted that there are no statutory enactments which would enlarge the jurisdiction of a magistrate to grant a sum or have intended to grant a sum in excess of RM25,000 (re: *Perbadanan Labuan v Sabah Urban Development Corporation Sdn Bhd* [2009] 6 CLJ 700; *Kee Chai Heng v Ketua Polis Daerah Kuala Muda & Anor* [1999] 2 MLJ 668; [1999] 2 CLJ 664).

[13] It is submitted that the respondent is solvent and has produced as evidence a bank draft to show that they have monies to meet the respondent's purported claim under the petition as it falls due.

[14] The petitioner in their submission has sought to suggest that through the production of evidence of solvency that this is to be read as an admission of the alleged debt due.

THE RESPONDENT/PETITIONER'S ARGUMENTS

[15] The petitioner's claim against the respondent is for the sum of RM35,654.55 for liquidated ascertained damages ('LAD') for late delivery of a bungalow lot from 11 May 2006 to 15 September 2011. Judgment was obtained in the magistrates court on 28 April 2006 for LAD amount of RM4,631 as at 14 January 2008. The respondent's appeal to the High Court was dismissed on 14 January 2008.

[16] The petitioner had fully paid the purchase price of the bungalow lot on 20 April 2009 as per the SPA. The petitioner had filed an originating summons on 21 June 2011 for a declaration to have the SPA terminated for failure to deliver the bungalow lot and the money refunded. The High Court decided that since the petitioner had made an election to sue for LAD and obtained judgment on 28 April 2006 the agreement cannot be terminated.

[17] On 15 September 2011 the petitioner issued a fresh claim from 11 May 2006 to 5 September 2011 for the outstanding LAD.

[18] Learned counsel for the petitioner submitted that the respondent's allegation that LAD had been paid in full misconceived since LAD payment from 10 June 2002 until 10 May 2006 had only been paid based on the first winding up order.

THE LAW

[19] The case of *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other Appeals* [2001] 4 MLJ 187 cited by the respondent's counsel where it was held by the Court of Appeal that one of the most abused process adopted in winding up is the application to strike out petition.

[20] In a winding up of a company the persons who may present a petition for winding up is provided under s 217(1) of the Companies Act namely:

(a) the company;

(b) any creditor, including a contingent or prospective creditor, of the company;

(c) a contributory or any person who is the personal representative of the deceased contributory or the trustee in a bankruptcy;

(d) the liquidator;

(e) the Minister pursuant to s 205 or on the ground specified under s 218(1)(d);

(f) Bank Negara Malaysia if it is a licensed institution;

(g) Bank Negara Malaysia in the case of a company which is licensed under Insurance Act 1996; and

(h) the registrar on the ground specified in s 218(1)(m) or (n).

[21] There are strong views expressed by our courts of the undesirability to adopt a striking out procedure in a winding up petition under s 218 of the Act since it could cause further delay rather than expedite the disposal of such matter. In the case of *Filotek Trading Sdn Bhd v Buildcon-Cimaco Concrete Sdn Bhd* [1994] 4 MLJ 268; [1999] 4 CLJ 135 Abdul Hamid Mohamed J (as he then was) observed:

> … The strongest argument against the application of the RHC 1980 is the provision of O 1 r 2(2) of the RHC 1980 itself. Besides, the Companies (Winding-up) Rules 1972 provides its own scheme of procedure for a s 218 winding up petition which is more simplified and geared for speedy disposal. RHC 1980, for example, provide for appearance (conditional and unconditional), discoveries, interrogatories, judgment in default of pleading, summary judgment (O 14), striking out of pleadings (O 18 r 19), summons for direction and setting down for trial. Hearing date is only given after the directions made in the summons for direction are complied with and the case has been set down for trial. Perhaps because of these requirements which take some time to be complied since the filing of a writ, that procedures for judgment in default of pleading, summary judgment and the striking out of the writs and pleadings are provided, for quick disposal in clear-cut cases. The scheme under the Companies (Winding-up) Rules 1972 is different. When the petition is issued out of court, a hearing date is given straight away.
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> Whatever has to be done, eg service, advertisement, compliance with r 32, will have to be done before the hearing date. The court is supposed to hear the petition straight away on the date fixed for hearing, the very first time it comes up before it. If everything is done as scheduled, the petition is heard on the date first fixed for hearing. That is what the rules envisage. In the circumstances, there is no necessity for provision for judgment in default, summary judgment or striking out the pleading or trial on issues. I am of the view that that is the reason why the Companies (Winding-up) Rules 1972 do not provide for such procedures. They are not necessary. Furthermore, more often than not, resort to O 18 r 19 of the RHC 1980 in a winding up proceedings results in the delay in the hearing of the petition.

> The application is usually filed one or two weeks before the date fixed for the hearing of the petition. Application is made for it to be heard first, supposedly, to save the court's time. In reality, it delays the hearing of the petition. Whenever there is such an application, inevitably, the hearing of the petition is delayed. Not only will the petition be adjourned for the application to be heard first, but if dismissed, there will be an appeal to the higher court(s).

[22] In the case of *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Perdana Merchant Bankers Bhd and other Appeals* [2001] 4 MLJ 187 the court held that an application made pursuant to O 18 r 19 of the RHC to strike out a petition presented under s 218 of the Act is undesirable and should be discouraged.

[23] Justice Richard Malanjum JCA (as he then was) in *&"" Ors" procphrase="""" v" party2="""" Tan Heng Chew """"&"" Ors""">Tan Kim Hor & Ors v Tan Heng Chew & Ors* [2003] 1 MLJ 492; [2003] 1 CLJ 634 said:

> In our view the use of that procedure in such winding up proceeding produces only delay in the adjudication of the matter. Of course we are not saying that it is totally inapplicable. There may be an instance where such a petition is obviously unsustainable for want of cause of action or that it is plainly vexatious or frivolous or even an abuse of process. In such a case O 18 r 19 could be resorted to.

[24] What the learned judge has to consider when dealing with the striking out application is whether the just and equitable principle is sustainable based upon the averments found in the petition. He cannot conduct a trial by affidavits and take into account irrelevant considerations such as alternative remedies.

[25] In a striking out application the court will dismiss an action summarily only if it is a plain and obvious case. In *Lee Nyan Choi v Voon Noon* [1979] 2 MLJ 28 Lee Hun Hoe CJ (Borneo) at p 29 observed that:

> The power to dismiss an action summarily without permitting a party to trial is a drastic power and should be exercised with utmost caution. The power of summary procedure should only be resorted to on plain and obvious cases.

[26] The Federal Court in *Roslan bin Abdullah v New Zealand Insurance Co Ltd* [1981] 2 MLJ 324 and in *Golden Century Development Sdn Bhd & Anor v Ganhoe & Anor* [1983] 1 MLJ 86 referred to the English case, *AG of Duchy of Lancaster v L&NW Railway Co* [1892] 3 Ch 274 and observed that summary procedure:

> … can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable' …

[27] The principle relating to O 18 r 19(1) of the RHC was considered in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 Mohamad Dzaiddin SCJ (as he then was) said at p 43 that:

> It is only in plain and obvious cases that recourse should be had to summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd*) and this summary procedure can only be adopted when it can be clearly seen that a claim or answer can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'.

[28] His Lordship goes on to say that such process …,

> … cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence … The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[29] One of the main grounds relied upon by the respondent for this application is that there is no judgment obtained by the petitioners and that the debt has been compromised. His Lordship Abdul Hamid Mohamad J (as he then was) said in the case of *SP Setia Bhd v Gasing Height Sdn Bhd* [2001] 5 MLJ 117 at p 120; [2001] 6 CLJ 51 at p 58:

> It must be remembered that where a petition is not founded on a judgment, the respondent is always at liberty to dispute the alleged debt. If it can be shown that there is a bona fide dispute to the debt, the court will not make a winding up order. But, that is done at the hearing of the petition. This is an application to strike out the petition before even the petition is heard. The only ground on which the petition may be struck out is where the petition is frivolous, vexatious and/or an abuse of the process of the court.

[30] His Lordship went on further to say that:

> … that the procedure to strike out a winding up petition, be it under O 18 r 19 of the Rules of the High Court 1980 ('the RHC') or under the inherent jurisdiction of the court should not be allowed to be used in a proceeding for a winding up. This is because a winding up proceeding is different from a writ action. In a winding up proceeding, where, as in this case, the petition is not founded on a judgment, at the hearing of the petition, so long as it can be shown that there is a bona fide dispute to the alleged debt, the petition will be dismissed. What the court has to decide at the hearing of the petition in such a case (also in this case) is similar to what the court has to decide at the hearing of an application to strike out a writ and statement of claim under O 18 r 19 of the RHC 1980 or the inherent jurisdiction of the court. When, as in this case, even before petition is heard, an application is made to strike out the petition, what is the court supposed to do? Decide whether there is a bona fide dispute to the debt? That is a matter to be decided at the hearing of the petition.

[31] In *Maril-Rionebel (M) Sdn Bhd & Anor* Justice Gopal Sri Ram JCA (as he then was) said that:

> … petition for winding up is not execution. For a winding up petition is not based upon any judgment of a court. Normally, it is based on the inability of a company to pay its debts as and when they fall due. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s 218 of the Companies Act.

[32] Likewise in the instant case even though the petition is not based on a judgment the matter must be decided at the hearing of the petition whether there is a debt and the respondent is at liberty to dispute it.

[33] Justice Gopal Sri Ram in *Maril-Rionebel (M) Sdn Bhd & Anor* also referred to the case of *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95, where at p 97 Hashim Yeop A Sani CJ (Malaya) said:

> There are many tests to be applied to see whether a petitioner for a winding up order has locus standi. Insolvency is always a ground relied on in a petition. Prima facie an unpaid creditor is entitled to petition for a winding up order against a company which fails to pay its debt. Macpherson says that the only test which seems capable of resolving all difficulties is that suggested by Crossman J in *Re North Bucks Furniture Depositories Ltd* [1939] 2 All ER 549, namely, that the term 'creditor' 'includes every person who has the right to prove in winding up'. Looking at the grounds given in the petition in the instant case it is clear to us that the petition should not have been struck out in limine and should have been heard on its merits. This was the approach of this court in *Chip Yew Brick Works Sdn Bhd v Chang Hee Enterprise Sdn Bhd* [1988] 2 MLJ 447.
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> The appellant should not be prevented from pursuing its petition so that the court would be able to consider all evidence and determine whether it should exercise its discretion to order winding up or not. Relevant to this appeal is that part of the judgment in *Chip Yew Brick Works Sdn Bhd* [1988] 2 MLJ 447 which appears at p 448 and 449: Even where the whole amount of debt claimed is disputed, the court can allow evidence to be adduced to enable it to consider whether or not there was a bona fide dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197.

[34] Applying the principles as expounded in the abovementioned cases and having considered the submissions together with the authorities cited by the parties this case is clearly not a plain and obvious case that should be summarily disposed. There is a valid cause of action which will have to be dealt with by the hearing petition.

[35] Therefore encl 6 is dismissed with cost.

Application dismissed with costs.

Reported by Afiq Mohamad Noor